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# Executive Justice?

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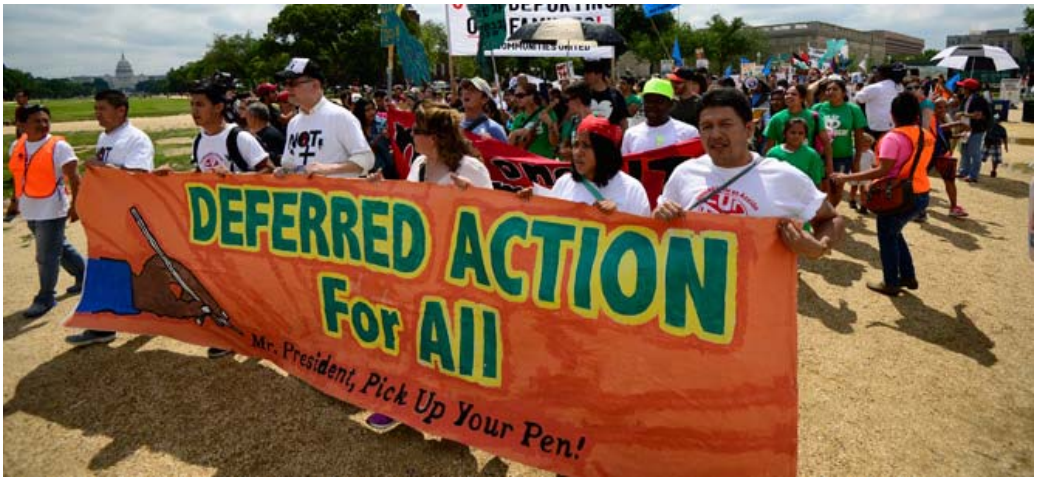


Protesters call for an end to deportations, Washington, D.C., August 1, 2014 (NDLON / Flickr)

Harsh immigration laws and policies have turned the United States—what was once one of history's most open and immigrant friendly societies—into a "deportation nation." For more than a quarter of a century, the United States has undertaken a radical social experiment with deportation practices of unprecedented size, ferocity, and scope. The result is that millions of undocumented immigrants as well as many legal permanent residents still live in this country in a state of fear.

The executive order on immigration that President Obama announced last November filled part of a void created by a Congress that has failed to pass much-needed comprehensive reform legislation. A rambling 123-page opinion (in a case appropriately named *Texas v. U.S.A.*, written by a George W. Bush-appointed Texas federal judge), issued on February 16, ordered a temporary halt to the program on highly technical administrative law grounds. However, the president's immediate response is absolutely right: both law and history are on the administration's side.

The November order expanded the 2012 DACA program (Deferred Action for Childhood Arrivals), which had already "deferred" deportation to individuals who came unlawfully to the United States as children and who meet certain educational requirements. The November order extends eligibility to people who entered the United States as children before January 2010 (the prior cutoff was June 15, 2007). It increases the deferral period to three years from two years and eliminates the requirement that applicants be under thirty-one years old. A new program DAPA (Deferred Action for Parental Accountability) grants "deferred action" status to parents of U.S. citizens and green card holders who have been residing in the U.S. for five years and who meet certain other requirements.

These actions are carefully calibrated to protect families with U.S.-citizen members and young people who have especially compelling connections to this country. But the political and human price of the president's emphasis on families with citizens is substantial: a renewed commitment to apprehend and deport "criminal aliens" and neglect of immigrants without citizen children. While DACA and DAPA may shield some 5 million noncitizens from deportation, there are many among the estimated 11 million noncitizens in the United States without legal status who will remain vulnerable to deportation, including the undocumented parents of young people who benefit from DACA.

Still, some discretionary action was clearly needed: the human cost of the U.S. deportation experiment for both the millions of undocumented and their family members who are citizens has been devastating. In 1996 President Bill Clinton signed new laws that amplified the authority of the federal government to arrest, detain, and deport non-citizens. Unusually harsh and poorly conceptualized legislation hardened the immigration system. The 1996 laws—ironically spurred by the Oklahoma City bombing that was initially blamed on foreign terrorists—responded to public and congressional frustration about ineffective border control policies and inflammatory and largely inaccurate concerns about "criminal aliens." As a result, millions of migrants—including not only the undocumented, but also tens of thousands of legal permanent residents (those with "green cards")—have experienced summary arrest, incarceration without bail, transfer to remote detention facilities, family separation, deportation without counsel, and lifetime banishment from what is, in many cases, the only country they have ever known as home.

Among many compelling examples, the United States has deported young Cambodians who arrived here as toddlers with their mothers fleeing genocide; grandfathers convicted of driving while intoxicated; and many long-term legal permanent residents convicted of drug possession offenses. Under prior laws, many of these deportees would likely have been allowed to become—or to remain—legal permanent residents or naturalized citizens.

The size of the current enforcement system is stunning. Removals and returns (a less formal mechanism to force people to leave the country) have exceeded 1 million per year from the mid-1980s through 2010, though the numbers have decreased somewhat recently. Still, the total number of deportations during the Obama administration is higher than during the George W. Bush administration. The Department of Homeland Security has, for many years, detained tens of thousands of people annually for at least twenty-four hours, in over 400 facilities, at an annual cost exceeding $1 billion. Indeed, immigration enforcers operate the largest system of incarceration in the United States, with more admissions and releases than the Bureau of Prisons or any state or local department of correction.

Clearly, this has to change. Yet, instead of moving to pass humane and comprehensive reform, the Republicans who now control Congress blasted Obama's executive order as a blatant violation of the law. Some conservatives even talked about impeachment. Senator Jeff Sessions, chair of the immigration subcommittee, described the president's actions as a "massive alteration of the classical understanding of what laws mean in America." The Texas judge, who was more concerned about the cost to his state of providing driver's licenses to DAPA beneficiaries than about how deportation might affect migrants and their families, opined that "the Government has abandoned its duty to enforce the law."

Nothing could be further from the truth. Indeed, both contemporary law and history make clear that administrative discretion of this type is normal and legal. Moreover, it has often spurred positive legislative action. As President Obama noted when he announced his order, "the best way to solve this problem is by working together to pass . . . common sense law." Frequently, once the partisan fires die down, strong discretionary executive actions inspire the kind of pragmatic immigration laws that are now so urgently needed. Of course, executive action may also spur negative, reactionary legislation. The outcome of such dynamic interplay depends on how we understand the relationship between the rule of law and discretion and, of course, on politics.

There are structural as well as political reasons why this is so. Law, discretion, and policy are inextricably connected. The president's critics often draw a bright line between immigration discretion and law and policy. This obscures both the political aspects of legal decision-making and the legal aspects of democratic power. It is a similar reductionist mistake to view politics solely as the realm of irrational preferences, or to view law as the realm of transcendent "neutral principles."

Discretion is a particularly complex part of the legal system that is often misunderstood. The philosopher Ronald Dworkin once referred to it as the "hole in the doughnut," a sort of open space within the more tangible parts of the rule of law. It is the space in which the executive branch often must work to enforce the law. As such, it demonstrates the inevitable complexities of enforcement in any large system. This is particularly true for immigration law, a legal system that has long embodied many discretionary features owing to its inevitable involvement with foreign policy and many other multifaceted aspects of law and society in need of fine calibration. Across the political spectrum we find wide agreement about the high stakes of such discretionary actions. Indeed, even the conservative Justice Anthony Kennedy has agreed that "Immigration policy shapes the destiny of the Nation."

Executive discretion toward immigrants is as old as the American republic itself. Indeed, when George Washington assured a group of Irish immigrants in 1783 that the "bosom of America is open to receive . . . the oppressed and persecuted of all Nations and Religions," he also cautioned that such welcome was subject to discretionary considerations: "[I]f, by decency and propriety of conduct, they appear to merit the enjoyment." Obama's discretionary action reflects this same understanding of how immigration laws must work.

Discretion is especially important in the realm of deportation. In addition to the inherent complexity of deportation law, much of our immigration jurisprudence has long been rather formalistic, a vestige of its nineteenth-century roots. Supreme Court cases from that era—still accepted as precedent—rejected rights claims of Chinese laborers against harsh, race-based exclusion and deportation laws. Deportation was said to be civil, not criminal. It was viewed as inherently regulatory, rather than sometimes punitive, a cruel and counterintuitive fiction followed by U.S. courts to this day. As a result, many constitutional rights that criminal defendants have, such as a right to appointed counsel or even a clear right against retroactive punishment, are unavailable. Thus, for example, people have been deported as "aggravated felons" (the harshest category, resulting in lifetime banishment) for offenses that were not defined as aggravated felonies at the time they were committed.

Executive discretion has long been vital to this system. As the U.S. Supreme Court emphasized in its 2012 *Arizona v. United States* decision: "A principal feature of the removal system is the broad discretion exercised by immigration officials." In that

case, the Supreme Court invalidated certain Arizona laws relating to immigration, while conditionally upholding a provision that allowed Arizona state police to investigate the immigration status of an individual stopped, detained, or arrested if there is "reasonable suspicion" that the person is in the country illegally.

There are three main types of executive discretion that can inspire the passage of new immigration laws. First, deportation agents and government lawyers must decide whether to arrest and deport a particular person. This is "prosecutorial discretion." Second, they exercise various types of "interpretive discretion," which cut through the complexities of such immigration law terms as "hardship" and "persecution." Some agency interpretations have been rather harsh and strange, leading to court challenges. For example, state misdemeanors have been deemed federal "aggravated felonies," the worst possible immigration law violation. Government lawyers have in the past interpreted simple possession of drugs to be "drug trafficking," a position that was ultimately rejected by the Supreme Court in 2006 (*Lopez v. Gonzales*). Other interpretations, however, have been more protective and generous, such as increasing agency recognition of asylum claims by survivors of domestic violence or those who face violence due to their sexual orientation. Finally, in some situations there is the ultimate discretion to recognize unusual circumstances, hardships, unfairness or injustice, and to craft a remedy in immigration court. The harshness of deportation law has long been mitigated by the possibility of such remedial discretion. This "delegated discretion" is seen in the various "waiver" and "relief" provisions that still exist in U.S. immigration law.

Beyond their ameliorative and inevitably interpretive functions, these various forms of discretion may all be understood as mini-experiments in legislation. As such they offer particularly powerful examples—with track records—for Congress to follow. Of course, discretion, a double-edged sword, may also cut unduly harshly. In such cases, courts may be called upon to adjudicate rights challenges. Either way, however, discretion is an essential component of our necessarily broad understanding of the rule of law. It must be understood as an inevitable component of continuous dialogue among various levels and branches of our government about how to treat noncitizens.

Executive orders on immigration by recent presidents have led directly to the passage of new legislation. From 1987 to 1990, Presidents Ronald Reagan and George H. W. Bush used their executive authority to protect from deportation a group of people Congress had ignored in its 1986 immigration reform law: the spouses and children of individuals who were in the process of becoming legal. These "Family Fairness" executive actions sought to avoid separating families in which one spouse or parent was eligible for legalization, but the other spouse or children living in the United States were not. After Reagan and Bush acted, Congress later protected the family members with the passage of new legislation in 1990 and 1991. Indeed, since 1956, every U.S. president has granted temporary immigration relief to one or more groups in need of assistance. The propriety of such discretion has been recognized by such subsequent laws as that authorizing "Temporary Protected Status," which allows the Secretary of Homeland Security to designate the nationals of a foreign country for temporary protection due to conditions in the country that temporarily prevent the country's nationals from returning safely.

Despite this long track record, this is hardly the first time that congressional conservatives have assailed such acts of executive discretion. Consider the experience of Frances Perkins, the Secretary of Labor during the New Deal, whose department was then responsible for immigration and naturalization. Perkins was a

strong believer in due process in deportation proceedings. But she faced a firestorm of criticism in 1939 when she delayed the deportation of Harry Bridges, the radical head of the West Coast longshoreman's union who had been born in Australia. Republican Rep. J. Parnell Thomas, who later chaired the House Committee on Un-American Activities, sought to impeach Perkins for "failing, neglecting, and refusing to enforce the immigration laws of the United States. . . ." The resolution died in the House Judiciary Committee, but Perkins seriously contemplated resigning to protect President Franklin D. Roosevelt. Fortunately, she stayed on the job and continued to imbue immigration laws with what she termed a "spirit of fair play." Indeed, she appointed James Landis, the dean of Harvard Law School, to preside in Bridges' case. He conducted an exceptionally thorough and formal hearing, essentially modeled on the protections given to defendants in criminal cases. Though his actions inspired furious reactions from conservatives at the time, they also crafted important procedural safeguards—such as public hearings, a right to subpoena witnesses, and a right to a transcript—that are now well-accepted features of the statutory system.

Perkins also sought to regularize the status of many European immigrants who had lived in the country for a long time and whose spouses or children were citizens or legal residents. Then, as now, they were required to leave the country to obtain immigrant visas, a process not only expensive and inconvenient but one also fraught with uncertainty. A consular official could effectively bar them from return. The INS instructed these immigrants to go to Canada to obtain a visa from the American consul. But the agency examined them before they left, essentially guaranteeing their re-entry. This novel, if awkward, procedure laid the basis for Congress to create so-called "adjustment of status," which to this day allows many thousands of eligible immigrants to regularize their status in the United States annually.

The Supreme Court long ago held that immigration is a "field where flexibility and adaptation of congressional policy to infinitely variable conditions constitute the essence of the program" (*Knauff v. Shaughnessy*). The complexity of immigration enforcement compels the executive branch to balance strenuous enforcement with efficiency, logic, and humane treatment. Consider an old immigration statute known as Section 212(c), which derived from the Immigration Act of 1917. The law waived "exclusion" grounds for permanent residents who had lived in the United States for more than seven years and who traveled abroad but who, upon return, risked getting caught in a welter of exclusion rules. Over time, it became clear that it was irrational and unfair to treat such long-term residents differently from those who remained in the country. The executive branch therefore extended Section 212(c) to long-term residents facing removal. The federal courts soon agreed that this made sense and Section 212(c) became a well-accepted defense to deportation. Administrative practice based on fairness and logic had triumphed over legislative inaction. Congress eventually enacted a somewhat stricter but analogous provision known as "cancellation of removal."

Executive action has also sometimes solved problems on a massive scale. In the 1950s, the INS adjusted the status of some 30,000 Chinese immigrants who were in the country unlawfully. For decades, some Chinese immigrants had fraudulently claimed American citizenship in order to circumvent exclusion laws passed decades before. The INS decided to legalize their status if they confessed and swore they were not Communists. In 1956, President Truman also used executive authority to "parole" into the country tens of thousands of Hungarian refugees. After Fidel Castro took power in Cuba in 1959, Presidents Eisenhower, Kennedy, and Johnson all "paroled" Cuban exiles into the United States (parole in such contexts meaning they were

allowed to enter the United States legally). The 1966 Cuban Adjustment Act in 1966 and the 1980 Refugee Act both stemmed from their actions.

Maurice Roberts, former chairman of the Board of Immigration Appeals, once noted that, "In terms of human misery, the potential impact of our immigration laws can hardly be overstated." When Congress has been unwilling to enact needed statutory reforms, the executive branch has often used its discretionary authority to ameliorate harsh—and often unintended—consequences of existing laws. This, in turn, has often spurred legislative action. Whether such action is reactionary or progressive depends, of course, on political activism. In this case, however, the widespread recognition of the logic, justice, and fairness of the president's action should inspire some optimism.

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